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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1343

THELBERT EARL O'KELLEY and
EUGENE THURMAN LANDERS, JR.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

LEGGETT, GIANOLA & DACEY,
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Petitioners respectfully request that this Court Grant rehearing of its order dated June 3, 1968, which denied certiorari and that the Court now grant certiorari and that a writ issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, in the above entitled case, as prayed for in the petition filed April 19, 1968, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The petition for certiorari previously filed herein presented the question whether the petitioners were

denied due process of law by the Trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

On April 23, 1968, and following the point of time that the instant petition for writ of certiorari was filed, a substantial intervening circumstance has taken place in that this Court rendered a decision in the case of *Jack Allen Barber, Petitioner, v. Ray H. Page, Warden,* 20 L. Ed. 2d 255, which case is directly analogous to the instant case and cogently supports the proposition that the petitioners herein were denied due process of law in violation of their Sixth and Fourteenth Amendment rights by the Trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

Said case cogently supports the proposition that the petitioners herein had the absolute constitutional right to produce a material out-of-state witness and have his oral testimony heard at the time of trial in order that the trier of fact could properly judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Regardless of the fact that the subject witness' deposition was favorable to the defense, the petitioners should not have been forced to introduce said deposition in lieu of having the benefit of his oral testimony at the time of trial. In fact, the case of *People*

v. Bossert, 14 Cal. App. 111, 111 Pac. 115, is on all fours with the instant case and supports this proposition. In that case the Trial Court held that the defendant was not entitled to the process of the Court compelling the attendance of material witnesses, and forced the defendant to submit his case to the trier of fact without the benefit of their oral testimony. By this ruling it is clear that the defendant was deprived of a constitutional right, for which the judgment and order were reversed and the cause remanded for a new trial. It would appear clear that this Court had this in mind when it stated in its recent case of *Barber v. Page,* 20 L. Ed. 2d 255, 258, as follows:

> "Many years ago this Court stated that 'The primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States,* 156 US 237, 242-243, 39 L Ed 409, 411, 15 S Ct 337 (1895)."

Further, this Court appropriately held in said case of *Barber v. Page,* 20 L. Ed. 255, page 259, that whatever may have been the accuracy of the theory at one time that the mere absence of a witness from the

jurisdiction was sufficient ground for dispensing with confrontation on the theory that "it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless," it is clear at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law. When the petitioners herein properly made their motion in the Trial Court to produce the material out-of-state witness at the time of trial, the State of California was under an obligation to make a request that the State of Wisconsin exercise its discretion to produce the material witness in question. The possibility of a refusal is not the equivalent of asking and receiving a rebuff. (*Barber v. Page,* 20 L. Ed. 2d 255, 260.)

Finally, to suggest that the petitioners herein waived any rights to confront or to the production of a material witness under the facts of the instant case is answered by this Court in *Barber v. Page,* 20 L. Ed. 2d 255, 260, wherein the Court states that such procedure "hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'" (*Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart v. Janis,* 384 U.S. 1, 4 (1966). Moreover, the right to confrontation or the production of a witness is basically a trial right. It includes both the opportunity to examine or cross-examine and the occasion for the

trier of fact to weigh the demeanor of the witness, which has been denied in the instant case.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeal of the State of California, First Appellate District.

Dated, Vallejo, California,
June 24, 1968.

Respectfully submitted,
LEGGETT, GIANOLA & DACEY,
By CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.